83-1437

No.



IN THE

# Supreme Court of the United States

OCTOBER TERM, 1983

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JEFFREY MAREK, THOMAS WADYCKI and LAWRENCE RHODE,

*Petitioners,*

*vs.*

ALFRED W. CHESNY,

*Respondent.*

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## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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## QUESTIONS PRESENTED

1. Whether the defendants in a civil rights action are required to pay, under Title 42 U. S. C., § 1988, the plaintiff's attorney's fees as costs accrued after a valid offer of judgment under Rule 68 of the Federal Rules of Civil Procedure, when its offer of judgment has been rejected by the plaintiff and when the amount of the offer exceeds the subsequent judgment entered on verdict.

2. Whether fees recovered under a plaintiff's contingency contract should be disregarded by the district court in awarding "a reasonable attorney's fee" under Title 42 U. S. C., § 1988, when the contingency contract was never filed as required under General Rule 39 with the district court nor disclosed until oral argument on appeal.

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To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

JEFFREY MAREK, THOMAS WADYCKI and LAWRENCE RHODE, the petitioners herein, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in the above entitled case on November 3, 1983 and the denial of the petitioners' petition for rehearing *en banc* entered January 20, 1984.

## OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit was reported in 720 F. 2d 474 (7th Cir. 1983) and printed in Appendix A hereto *infra*, pages A-1-11.

The opinion of the United States District Court for the Northern District of Illinois, Eastern Division, is reported at 547 F. Supp. 542 (N. D. Ill. 1982) and is printed in Appendix B hereto *infra*, pages B-1-12.

## JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit (Appendix A, *infra*, pages A-1-11) was entered on November 3, 1983. The jurisdiction of the United States Supreme Court is invoked under 28 U. S. C., § 1254(a).

On January 20, 1984, the United States Court of Appeals for the Seventh Circuit (Justices Bauer, Coffey, and Pell dissenting) denied the petitioners' petition for rehearing *en banc*. The denial is printed in Appendix C hereto, *infra*, page C-1.

## STATUTES INVOLVED

**United States Code, Title 42, § 1988 as amended. Proceedings in vindication of civil rights; attorney's fees.**

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this Title, and of Title "CIVIL RIGHTS," and of Title "CRIMES," for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they



are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against the law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty. In any action or proceeding to enforce a provision of § 1981, 1982, 1983, 1985 and 1986 of this Title, Title IX of Public Law 92-318, or Title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

**United States Code, Title 28, Rule 68. Offer of Judgment.**

At any time more than 10 days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against him for the money or property or to the effect specified in his offer, with costs then accrued. If within 10 days after the service of the offer the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service thereof and thereupon the clerk shall enter judgment. An offer not accepted shall be deemed withdrawn and evidence thereof is not admissible except in a proceeding to determine costs. If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer. The fact that an offer is made but not accepted does not preclude a subsequent offer. When the liability of one party to another has been determined by verdict or order or judgment, but the amount or extent of the liability remains to be determined by further proceedings, the party adjudged liable may make an offer of judgment which shall have the same effect as an offer made before trial if it is served within a

reasonable time not less than 10 days prior to the commencement of hearings to determine the amount or extent of liability.

**Rules of the United States District Court, Northern District of Illinois Rule 39 appears in Appendix D.**

## STATEMENT OF THE CASE

Petitioners in this case are police officers of the Village of Berkley, a municipal corporation in Cook County, Illinois. (R. 1) The three officers were named as defendants in a civil rights action filed under 42 U. S. C., § 1983. The lawsuit was commenced in the United States District Court for the Northern District of Illinois on October 5, 1979. (R. 1)

On November 5, 1981, during the pendancy of this suit, petitioners submitted a written Rule 68 offer of judgment to the respondent which stated: "Pursuant to Federal Rule of Civil Procedure 68, the defendants, Jeffrey Marek, Thomas Wadycki and Lawrence Rhode, hereby offer to allow judgment to be taken against them by the plaintiff for a sum, including costs now accrued and attorney's fees, of One Hundred Thousand ($100,000) Dollars". This offer of judgment was not accepted by the respondent. (R. 144)

Commencing April 19, 1982 the civil rights case was tried to a jury. (R. 96) At the conclusion of a three week trial, the respondent asked the jury for its verdict in the sum of $3,500,000. On May 11, 1982, the jury returned an itemized verdict for the respondent in sums which totaled $60,000. (R. 120)

During the post-trial proceedings, the parties stipulated that the respondent's costs and attorney's fees incurred before the date of the offer of judgment in November, 1981, would be $32,000. (R. 170) Subsequently, the respondent accepted that sum and was paid by petitioners, pursuant to order of court. (R. 170)



The respondent by post-trial motion, in the meantime, had demanded that petitioners pay his attorney's fees of approximately $171,000 accrued for work performed after the offer of judgment. (R. 139) The district court in its opinion, printed in Appendix B herein, ruled that the respondent's failure to accept the offer of judgment required the respondent, not the petitioners, to pay respondent's own costs including attorney's fees accrued after the date of the offer of judgment. (R. 160) The district court held that the term "costs" in Rule 68 should include the term "attorney's fees" within the meaning of Civil Rights Attorney's Fee Act of 1976. Title 42 U. S. C., § 1988. (R. 160) § 1988 specifically provides that reasonable attorney's fees may be allowed "as part of the costs". District Judge Shadur held that the respondent is not entitled to receive payment for his attorney's fees accrued after November 5, 1981, the date of the offer of judgment. The district court held that the respondent had not obtained a judgment which was more favorable than the offer (*Chesny* v. *Marek,* 547 F. Supp. 542, 545 (N. D. Ill. 1982) (Appendix B-5) and that, therefore, under Rule 68 respondent must pay his own costs, including fees accrued after the date of the offer of judgment. (R. 160 and Appendix B-12)

The respondent appealed the decision of the district court to the Seventh Circuit Court of Appeals, which reversed. (R. 171) During oral argument before the Seventh Circuit, the respondent for the first time revealed that his client had executed a written contingent fee agreement with him. Violating a local rule of the Northern District of Illinois, the respondent's attorney had not submitted his contingent fee contract to the district court for filing with the complaint, nor did he at any time advise the district court of what he would receive under the separate contingent fee agreement of which he now revealed the existence. General Rule 39 for the Northern District of Illinois specifically requires that all contingent fee contracts be filed with the district court as soon as the complaint is placed with the clerk for filing. (Appendix D)

The Seventh Circuit, while reversing the district court's opinion, agreed with the district court that the petitioners' form of offer of judgment was valid in its inclusion of attorney's fees as part of the offer of judgment. *Chesny* v. *Marek*, 720 F. 2d 474 (7th Cir. 1983) The Seventh Circuit also found that the offer of $100,000 was clearly more favorable than the subsequent jury verdict of $60,000. Nevertheless, the Court of Appeals for the Seventh Circuit held that costs under Rule 68 should not include attorney's fees, because that would be in conflict with the congressional policy manifested in § 1988, Civil Rights Attorney's Fees Act. Petitioners filed a petition for rehearing *en banc* to which the Court of Appeals requested a response. After the response was filed the Petition for Rehearing was denied by majority vote, three justices dissenting.

In construing the "right" to attorney's fees under § 1988, the Court of Appeals held that such a right is of a substantive nature, not procedural and concluded that the respondent here is entitled to all fees accrued after rejecting the offer of judgment notwithstanding Rule 68 of the Federal Rules of Civil Procedure.



## REASONS FOR GRANTING THE WRIT OF CERTIORARI

### I. The Seventh Circuit Has Nullified the Established Public Policy in Rule 68 of the Federal Rules of Civil Procedure, Which Is to Encourage Settlements, by the Court's Refusal to Enforce Rule 68 When It Would Bar a Claim for Certain Attorney's Fees in a Civil Rights Lawsuit.

The offer of judgment under Rule 68 of the Federal Rules of Civil Procedure in the hands of the trial bar has grown into a vigorous force to cut through litigation delays and expenses. Due to the provisions of the Rule itself, the frequency with which Rule 68 offers of judgment are made in any federal lawsuit cannot be directly demonstrated. An offer of judgment does not become part of the district court record unless it is either accepted by the plaintiff, resulting in entry of judgment by the clerk, or it is incorporated in the record in a post-trial proceeding to determine costs, as in the instant case. 28 U. S. C. Rule 68.

Rule 68 has been part of the Federal Rules of Civil Procedure for over 40 years, 28 U. S. C. Rule 68 (1938). (Amended effective 1948 and 1966) With the enactment of civil rights legislation, 42 U. S. C. §1983, §1988, it has become an actively used method of lawsuit resolution at the district court level. Its use in recent years is evidenced and manifested by the extensive number of judicial opinions being published, which have discussed Rule 68.[1] The language of the Rule itself is founded on previously existing state statutes from Minnesota (2 Minn. Stat. § 9323 [Mason 1927]); Montana (4 Mont. Rev.

[1] *Delta Air Lines, Inc.* v. *August*, 450 U. S. 346 (1980) (Rule 68 held not to require plaintiff's payment of defendant's costs when plaintiff loses Title VII case); *Fulps* v. *City of Springfield*, 715 F. 2d 1088 (6th Cir. 1983) (Costs held to include attorney's fees in Rule 68 offer of judgment context of § 1981 litigation); *Pigeaud* v. *McLaren*, 699 F. 2d 401 (7th Cir. 1983) (Held if offer of judgment does not

*(Footnote continued on next page)*

Codes Anno. § 9770 [1935]); and New York (N. Y. Civ. Prac. Law § 177 [Cahill 1937]). Attorneys practicing in state courts today are also confronted with offers of judgment which are prevalent in state statutes.[2] In *Delta Air Lines, Inc.* v. *August,* 450 U. S. 346 (1980) Justice Powell, concurring with the majority opinion, recognized the importance of Rule 68:

> On the other hand, parties to litigation and the public as a whole have an interest—often an overriding one—in settlement rather than exhaustion of protracted court proceedings. Rule 68 makes available to defendants a mechanism to encourage plaintiffs to settle burdensome lawsuits. The Rule particularly facilitates the early resolution of marginal suits in which the defendant perceives the claim to be without merit, and the plaintiff recognizes its speculative nature. (Footnote omitted). *Id.* at 363.

Rule 68's method of effective dispute resolution is not an unknown or novel theory.

Yet, despite the existence and use of offers of judgments in both the state and federal court systems, the Seventh Circuit in this case avers that plaintiff's civil rights attorneys should not be burdened with Rule 68, because it reasons in part that Rule 68 is old and has been "little known and little used." *Chesny* v.

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*(Footnote continued from preceding page)*

mention attorney's fees, they will not be include in "costs"); *Bitsouni* v. *Sheraton-Hartford Corp.,* 52 LW 2354 (D. Co. 1983) (prevailing plaintiff not entitled to his attorney's fees post-offer of judgment when verdict is less than offer); *Lyons* v. *Cunningham,* (costs include attorney's fees under Rule 68 in civil rights case); *Waters* v. *Heublein,* 485 F. Supp. 110 (N. D. Cal. 1979) (offer of judgment costs held to include attorney's fees in Equal Pay case); *Scheriff* v. *Beck,* 452 F. Supp. 1254 (D. Colo. 1978) (Costs held to include attorney's fees when offer of judgment made).

[2] Ala. R. C. P. 68; Alaska Civ. R. P. 09. 60.015; Del. Sup. Ct. R. 68; Fla. R. C. P. 1.442; Ind. Stat. Anno. TR 68; Ky. Rev. Stat. Vol. 17, Rule 68; Miss. R. C. P. 68; Neb. Rev. Stat. § 25-906; Nev. R. C. P. 68; N. J. Rule 4:58-1; N. Mex. R. 68; No. Dak. Rule 68(a); Wisc. Stat. Anno. 807.01 [1] and [3].



*Marek,* 720 F. 2d 474, 475, 479 (1983). The *Chesny* opinion is silent in answer to the question of why Rule 68 is a dusty artifact of legal history. It does not mention that in civil rights suits Rule 68 has frequently been used in recent years, nor does it mention that the Rule has been the subject of extensive legal writing.[3]

By construing the term "costs" in the Civil Rights Attorney's Fees Act, 42 U. S. C. § 1988, not to include attorney's fees in the face of a Rule 68 offer of judgment, the Seventh Circuit creates untoward confusion. This confusion has potential disasterous and far reaching consequences to the effective federal administration of justice by undercutting one of the Federal Rules of Civil Procedure. The Seventh Circuit violates a fundamental principle of statutory construction: statutes must be construed so that they harmonize with one another and are applied in a consistent fashion. This rule of construction, when followed, implements the intent of the legislature. *Kokoszka* v. *Bedford,* 417 U. S. 642 (1974); *Bonner* v. *Coughlin,* 647 F. 2d 931 (7th Cir. 1981). The Seventh Circuit itself in *U. S.* v. *Professional Air Traffic Controllers, infra,* reasoned that . . . "in interpreting legislative history, there is a presumption that Congress was aware of the judicial construction of existing law," and that new legislation, therefore, is to be construed within the entire framework of federal statutes. *U. S.* v. *Professional Air Traffic Controllers,* 653 F. 2d 1134, 1138 (7th Cir. 1981). In so holding, the Seventh Circuit followed this Court's opinion in *Shapiro* v. *United States,* 335 U. S. 1 (1948). Now, however, in *Chesny* v. *Marek,* 720 F. 2d 474 (1983), the Seventh Circuit deviates from this established principle.

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[3] "*Delta Air Lines, Inc.* v. *August:* The Agony of Victory and the Thrill of Defeat" 35 Ark. L. Rev. 604 (1983); "Rule 68: A 'New' Tool for Litigation", 1978 Duke L. J. 889 (1978); Case Notes, 9 Fla. St. U. L. Rev. 671 (1981); "Offer of Judgment and Statutorily Authorized Attorney's Fees: A Reconciliation," 16 Ga. L. Rev. 482 (1982); "Using and Abusing the Federal Rules," 7 Litig. 7-40 (1981); "Rule 68—Prevailing Defendants Not Within Purview of Rule 68," 51 Miss. L. J. 599 (1980-81). "Application of Offer of Judgment in Title VII" 2 Pace L. Rev. 331 (1982); "*Delta Air Lines, Inc.* v. *August:* taking the teeth out of rule 68" 43 U. Pitt. L. Rev. 765 (1982).

In this instance, § 1988 can clearly be harmonized with Rule 68 by adopting the district court's view that the plaintiff's attorney's fees be terminated as of the date of a Rule 68 offer of judgment when computing fees under § 1988. As in this case, if he prevails, plaintiff will always receive pre-offer fees. The district court's rationale would require that the plaintiff win less by judgment on verdict than the offer of judgment, and only then will Rule 68 come into operation. Thus, Rule 68 and § 1988 can exist in harmony.

The Seventh Circuit unintentionally has created a special class of attorneys who, because of the court's embrace, need not concern themselves with serious settlement attempts through the vehicle of Rule 68. If their client's claim is in some manner grounded in a civil rights statute, they are immunized from compliance with this provision of the Federal Rules of Civil Procedure.

The philosophy behind § 1988 that a plaintiff's civil rights attorney, as a "private attorney general", should vigorously pursue the vindication of meritorious civil rights actions is not questioned by petitioners. The Seventh Circuit, we believe correctly, cites with approval Senate Report No. 94-1011 (1976) as demonstrating the congressional intent that civil rights attorneys should not be deterred from bringing good faith litigation "by the prospect of having to pay their *opponent's* counsel fee should they lose." (Emphasis added). Indeed, a majority of the U. S. Supreme Court has already held in *Delta Air Lines, supra* that a winning defendant in a Title VII case, after an offer of judgment by defendant under Rule 68, will not be deemed to be a "prevailing party" for the purpose of shifting to the plaintiff the fee payment obligation of the defendant. The instant case, however, presents a different problem, because it concerns the shifting of plaintiff's, not defendant's attorney's fees. The Seventh Circuit finds, first, that the petitioners have submitted a valid and enforceable Rule 68



offer of judgment and have properly included plaintiff's fees. But the Seventh Circuit then enters previously unmapped and relatively unexplored territory in federal judicial policy to declare a new policy underlying § 1988. That policy is that Rule 68 should not be utilized so as to force plaintiff's civil right attorneys "to think very hard before rejecting [a valid Rule 68 offer of judgment] . . . ." *Chesny* v. *Marek*, 720 F. 2d 474, 479 (7th Cir. 1983) (Appendix A-8). Petitioners respectfully submit that attorneys before the federal bar should be expected to think very hard about and to comply with all the Federal Rules of Civil Procedure during the course of a lawsuit. Both justice and effective administration of the federal courts require uniform enforcement of Rule 68 in harmony with the policy of the Civil Rights Act.

The Seventh Circuit appears to have rendered its opinion by making a quantum leap from the premise of congressional concern expressed in Senate Report 94-1011 to the conclusion that attorneys of a certain category should not be forced to forego attorney's fees accrued during the trial, when they have rejected a settlement offer that was better than what the jury subsequently found their case to be worth. The expressed congressional intent behind § 1988 is not to abrogate the Federal Rules of Civil Procedure but to provide adequate compensation within the framework of those Rules for any attorney who brings a meritorious civil rights lawsuit. Logically, a "meritorious suit" should be one in which the plaintiff has every reasonable chance of becoming the "prevailing party" and thus collecting § 1988 fees.

The instant opinion of the Seventh Circuit would elevate these civil rights plaintiff's attorneys into a unique class of attorneys who in an economic sense can never lose. For example, in just one category of cases handled by civil rights attorneys, statistics show that for the period of June 30, 1982 to June 30, 1983 in Northern District of Illinois, 1076 lawsuits

were filed under the data category, "Civil Rights between private parties." *1983 Annual Report of the Director of the Administrative Office of the United States Courts, for the Twelve Month Period Ending June 30, 1983;* Appendix to 1983 Annual Report, Table 3C. Most, if not all of these cases, would have the potential for attorney's fees being paid to prevailing parties' attorneys. 42 U. S. C. § 1988. The Seventh Circuit reports its awareness that there are between 75 to 90 statutes providing for the payment of attorney's fees. *Chesny, supra,* at 477. In these categories of lawsuits, the Seventh Circuit's failure to enforce Rule 68 under the *Chesny* holding will effectively eliminate a most practical facility for settlement of lawsuits. So long as the plaintiff's attorneys in these suits are assured that their economic livelihood will never be diminished when they choose to ignore Rule 68 offers of judgment, they will enjoy membership in a unique class of attorneys before the federal bar.

The Seventh Circuit's opinion has extinguished any utilization of Rule 68 by a defendant as a method of reaching a just and equitable settlement in any civil rights litigation. Rule 68 is no threat to competent plaintiff's counsel in a meritorious civil rights case. Petitioners suggest that the good judgment of plaintiff's counsel will determine whether an offer of judgment which includes his attorney's fees is an appropriate financial settlement of his client's case. The abrogation of a Federal Rules of Civil Procedure as a policy decision by the Seventh Circuit Court of Appeals, on the other hand, is a substantial deviation from the just and orderly administration of the courts. The Seventh Circuit by its decision rewards plaintiff's attorneys for post-offer of judgment legal work, which has been performed only because of an attorney's mistake in judgment and which legal services, anachronistically, produces a worse result for the client. The petitioners believe that the integrity of the Federal Rules of Civil Procedure justify review by this Court of this public policy abrogation of Rule 68 in the Seventh Circuit.



## II. The Seventh Circuit's Decision in This Case Has Created a Conflict in the Circuits by Refusing to Hold That Attorney's Fees Are Included As Costs Under § 1988 Where Costs Are Subject to the Provisions of Rule 68.

Despite the plain language of Rule 68 and § 1988, the Seventh Circuit has ruled that attorney's fees are not to be included as part of the costs defined in § 1988. Under this holding, the plaintiff in a civil rights case is not now required to pay its own costs incurred under Rule 68 although the plaintiff obtained a verdict less than the offer of judgment. This holding by the Seventh Circuit presents a direct conflict with the holding by the Sixth Circuit Court of Appeals in *Fulps* v. *City of Springfield,* 715 F. 2d 1088 (1983). It also now leaves the Second Circuit facing a split in the circuits in the case of *Bitsouni* v. *Sheraton Hartford Corp.,* 52 LW 2354 (D. Conn. 1983). *Bitsouni* is now on appeal to the Second Circuit Court of Appeals, from the United States District Court of Connecticut. The holding in the instant case also conflicts with the concurring opinion of the Honorable Justice Powell in *Delta Air Lines, Inc.* v. *August,* 450 U. S. 346 (1980). This Court's majority opinion in *Delta* v. *August supra.* reversed the Seventh Circuit's holding of a fee award to the defendant under Federal Rule of Civil Procedure 68, but the majority opinion did not address the issue now presented.

The recent Sixth Circuit Court of Appeals opinion in *Fulps* v. *City of Springfield, supra,* states the law as petitioners would seek its construction, if this Court issues a Petition for Writ of Certiorari to the Seventh Circuit. The Sixth Circuit in *Fulps* states:

> Although there is no easy answer to the question whether in a Rule 68 offer of judgment in a civil rights case, the phrase "with costs then accrued" includes attorney's fees, we are inclined to agree with Justice Powell's analysis [in *Delta Air Lines* v. *August, supra.*] Other courts

which have considered the issue are divided. Two District Courts have concluded that the only reasonable accommodation of Rule 68 in the fees provision of the underlying statutes involves treating an offer for "costs than accrued" as including attorney's fees. See *Waters* v. *Heublein*, 485 F. Supp. 110 (N. D. Cal. 1979); *Scheriff* v. *Beck*, 452 F. Supp. 1254 (D. Colo. 1978). . . .

When Congress drafted 42 U. S. C. § 1988, it described attorney's fees "as a part of the costs." Congress could have simply authorized the recovery of attorney's fees, but it chose to go further and characterize the fees as costs. Required as we are to construe the language of a statute so as to avoid making any word meaningless or superfluous, we conclude that Congress expressly characterized fees as costs with intent that the recovery of fees be governed by the substantive and procedural rules applicable to costs. *Id.* at 1092.

This rationale of the Sixth Circuit Court of Appeals opinion in *Fulps* appears sound. It is respectfully submitted that the Seventh Circuit in the instant case has ignored the policy and the clear language of § 1988, and instead, rationalized a decision by stating: "The legislators who enacted § 1988 would not have wanted its effectiveness blunted because of a little known rule of court promulgated almost 40 years earlier". *Chesny* v. *Marek, supra,* at 479. Under Senate Report 94-1011, the legislators did express the view that the effectiveness of § 1988 should not be blunted by requiring plaintiffs to pay their opponent's attorney's fees. But it follows by neither logic nor policy that plaintiff need not bear his own fees, nor that the legislators of the Civil Rights Act were unaware of the Federal Rules of Civil Procedure. As stated by this Court in *Delta Air Lines, Inc.* v. *August, supra,* at 352, the congressional intent behind Rule 68 for the past 40 years has been to encourage settlement of litigation. It would defy logic to believe that the concern of a plaintiff's attorney having to pay his own photocopy, deposition and postage charges subsequent to an offer of judgment in a civil rights case would induce him to accept any offer of judgment, when he believes that his case has any



chance at all of prevailing at trial. The Seventh Circuit's opinion, if it remains in conflict with the Sixth Circuit, has effectively stripped Rule 68 of any settlement potential it may have in a civil rights case by reducing the Rule to the point where the plaintiff is only faced with paying his own photocopying, postage and deposition costs, if faced with an offer of judgment in a civil rights case. The plaintiff's legal fees, for example, in *Chesny* v. *Marek* would now total approximately $220,000 according to the respondent's response to the Petition for Rehearing in the Seventh Circuit Court of Appeals. His "costs" in regard to out-of-pocket expenses on the other hand total approximately $1,000. (Appendix A-7)

The Seventh Circuit has now taken all risks of litigation away from the respondent's attorney by providing that no matter what he does with the offer of judgment, he will still recover every dollar of his attorney's fees.

The holding here is in conflict with *Bitsouni* v. *Sheraton Hartford Corp.*, 52 LW 2354 (D. Conn. 1983), decided by the United States District Court for Connecticut, approximately three weeks after the Seventh Circuit's opinion in *Chesny* v. *Marek* and now on appeal in the Second Circuit. In *Bitsouni* v. *Sheraton Hartford Corp.*, the district court held that under Rule 68, the costs incurred after the making of the offer would be construed to include the plaintiff's attorney's fees. *Bitsouni* is a case arising under Title VII of the 1964 Civil Rights Act, in which the plaintiff had rejected an offer of judgment for $2,000, with costs accrued to that date. At trial, the plaintiff prevailed on her claim of sex discrimination and was awarded damages of $171.10. The district court held that the costs of the attorney's fees incurred after the date of the offer of judgment would not be included as part of the plaintiff's attorney's petition for fees. As mentioned, *Bitsouni* is currently on appeal to the Second Circuit Court of Appeals.

Also in conflict with the Seventh Circuit's ruling is the opinion of the Honorable Judge Cannella of the Southern

District of New York issued October 19, 1983, in *Lyons* v. *Cunningham, et al.*, 79 C 3953. (unpublished opinion). In that case, an offer of judgment under Rule 68 had been made in a civil rights case and was refused. The district court held that attorney's fees will be included as part of the costs under § 1988, and held that the plaintiff's attorney's fees accrued subsequent to the date of the offer of judgment would be denied. Reasoning in an earlier Seventh Circuit opinion [*Pigeaud* v. *McLaren*, 699 F. 2d 401 (7th Cir. 1983)] was rejected. *Lyons* v. *Cunningham* finds that the better view in the majority of cases supports the conclusion that Rule 68 is effective in precluding the plaintiff from recovering his attorney's fees accrued after an offer of judgment. In part, the district court rests its conclusion on this Court's opinion in *Hutto* v. *Finney*, 437 U. S. 678 (1978) that attorney's fees awarded pursuant to § 1988 are part of the costs.

As well as conflict between Circuits, the Seventh Circuit in this case has created a conflict between Rule 68 and § 1988. While the Sixth Circuit has harmonized these two provisions, the *Chesny* opinion puts them beyond reconciliation. Due to the confusion which the Seventh Circuit's opinion creates, uniformity on this question is imperative. A considerable number of lawsuits have involved the question of prohibiting plaintiffs' attorneys from recovering their attorney's fees in this context, and divergent judicial responses should not be allowed to continue.

Pursuant to Rule 17 of the Supreme Court of the United States, the petitioners request that this Court exercise its supervisory jurisdiction over the Seventh Circuit Court of Appeals in resolving this crucial and important question of statutory construction.



## III. By Refusing to Construe Attorney's Fees As Part of the Costs Under Section 1988, While Permitting the Plaintiff's Attorney to Claim a Contingent Fee Under an Undisclosed Contingent Fee Agreement, the Court Is Tolerating an Inappropriate and Unjust Enrichment to the Plaintiff's Civil Rights Attorney.

If the Seventh Circuit's opinion is allowed to stand, it will provide an avenue for unjust, windfall fees to plaintiff's civil rights attorneys. During the course of respondent's appeal, a previously undisclosed contingent fee agreement was found to exist between the respondent and his attorney. *Chesny* v. *Marek*, 720 F. 2d 474, 478. The respondent's attorney had failed to file his contingent fee agreement, with his Affidavit of Compliance under General Rule 39. This local rule for the Northern District of Illinois mandates that an attorney file a signed copy of his written contingent fee agreement, if any, when the complaint is filed with the clerk of the court. If no copy of the contingent fee agreement is submitted to the court, the attorney represents under oath that his compensation basis is on other than a contingent basis. (Appendix D) Here, the fee agreement was not filed by the respondent and was never disclosed to the district court.

Under the long standing principle established in *Newman* v. *Piggie Park Enterprises, Inc.*, 390 U. S. 400 (1968), prevailing parties are ordinarily allowed to recover reasonable attorney's fees unless special circumstances would mitigate against such an award. The Second Circuit in *Zarcone* v. *Perry*, 581 F. 2d 1039 (2d Cir. 1978) stated that the *Newman* ruling should not be applied "woodenly without consideration of the underlying factors which generated it." *Id.* at 1044. Leaving aside the question of Rule 68's application to this litigation, most circuits recognize that contingency fee agreements are to be closely scrutinized for their effect on a § 1988 award of attorney's fees. This rationale follows the general principle that the courts will scrutinize contingent fee agreements in the

context of litigation. *Rosquist* v. *Soo Line Railroad,* 692 F. 2d 1107 (7th Cir. 1982); *Krause* v. *Rhodes,* 640 F. 2d 214 (9th Cir. 1981).

Addressing this general principle the Ninth Circuit in *Buxton* v. *Patel,* 595 F. 2d 1182 (9th Cir. 1979) held that denial of attorney's fees under § 1988 did not connote judicial abuse of discretion in the situation where adequate compensation was available to the attorney through the verdict. A further reach of the application of the principle is found in *Brown* v. *Stackler,* 612 F. 2d 1057 (7th Cir. 1980), where the court denied all attorney's fees under § 1988 in a case brought to enjoin the enforcement of Illinois statutes concerning prices advertised for eyeglasses.

The legislative intent in applying the general principle has been analyzed by the Tenth Circuit, in holding that a contingent fee agreement when coupled with the grant of attorney's fees under § 1988 may result in a windfall profit for attorneys. *Cooper* v. *Singer,* 698 F. 2d 929 (10th Cir. 1982). The opinion in *Cooper* v. *Singer, supra,* cited with approval Senate Report No. 94-1011 (October 1, 1976) which states that the congressional intent is to attract competent counsel, not to produce windfalls to attorneys hidden behind a fee award. The *Cooper* Court went on to say:

> This caution against 'windfalls' for attorneys shows that Congress was exclusively interested in making civil rights actions more attractive to perspective plaintiffs. Congress was not trying to get these cases into court by making them lucrative to attorneys. Therefore, an award of attorney's fees which benefits a plaintiff's attorney rather than a plaintiff does not further congressional policy. *Id.* at 931.

Applying the principle here, the ruling of the Seventh Circuit contravenes this principle in awarding fees. The respondent has been unjustly enriched through utilization of § 1988 in conjunction with the newly revealed contingent fee agreement. The lawyer's rights, not the respondent's, are here at issue on this appeal. While reasonable attorney's fees serve public policy and should be allowed to attorneys for prevailing



parties, it is submitted that those reasonable fees in this instance already have been paid in full. To couple the award of any additional attorney's fees, due under Rule 68, with all amounts received under the contingent fee contract in this case will provide a windfall to the respondents' lawyer.

When the respondent answered the Petition for Rehearing in the Seventh Circuit Court of Appeals, the respondent revealed that he does have a contingent fee agreement at the rate of 45 percent to be paid from "all amounts recovered". The judgment on jury verdict in this case is $60,000 and has been paid, with 45 percent paid to the attorney. The respondent's attorney in addition has been paid $32,000 for his pre-offer of judgment attorney's fees (R. 170) with 55 percent to the client. Nevertheless, he is now claiming an additional $141,000 for his post-offer of judgment fees which the district court denied as well as an additional $38,000 for his fees on the appeal to the Seventh Circuit. These sums total $271,000.

To look through the perspective of respondent's attorney's client for a moment, Mr. Chesny will be recovering 55 percent of all amounts, including fees, under his agreement with his attorney. This amount at 55 percent of all sums recovered would total a cash payment to the respondent of $149,050 for a case that the jury considers to be worth only $60,000. Perhaps even more grave is the fact that the respondent, Mr. Chesny, will receive attorney's fees from the petitioners, even though the respondent does not have a license to practice law. Illinois Supreme Court Rule 771 adopts Canon 3 of the Code of Professional Responsibility, Ethical Consideration 3-8 and DR 3-102, which states that an attorney should not practice law in association with a layman or otherwise share legal fees with a layman. The respondent, if the Seventh Circuit's opinion is undisturbed, may share legal fees with his attorney. If this fee method is being used to circumvent the jury verdict, it should not be countenanced. Yet that is the result of statutory fee awards in the face of contingent fee agreements.

## CONCLUSION

The Seventh Circuit has significantly restricted the public policy purpose for use of Rule 68 of the Civil Rules of Procedure in civil rights litigation. The Seventh Circuit's opinion without modification undermines any serious settlement attempts by defendants in civil rights lawsuits. Although the Seventh Circuit has construed the logic of the district court to be a "wooden" application of statutory construction, the district court's logic and analysis places its opinion squarely in the majority of the district court and appellate court opinions which considered this issue. Rule 68 states that the offeree must pay the cost, if the resulting judgment is less favorable than the offer. Such is clearly the fact in this instance. § 1988 states that costs are to include reasonable attorney's fees. The offer of judgment made in this matter included reasonable attorney's fees as part of the costs. Due to the substantial departure from the public policy and from the clear statutory language of Federal Rules of Civil Procedure, Rule 68, the petitioners respectfully request that the United States Supreme Court exercise its power of supervision and resolve this important question of federal law.

Respectfully submitted,

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# APPENDIX

In the

# United States Court of Appeals

## For the Seventh Circuit

No. 82-2927

ALFRED W. CHESNY, Individually, and as Administrator of the Estate of STEVEN CHESNY, Deceased,

*Plaintiff-Appellant,*

*v.*

J. MAREK, et al.,

*Defendants-Appellees.*

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 79 C 4186—Milton Shadur, *Judge.*

ARGUED SEPTEMBER 30, 1983—DECIDED NOVEMBER 3, 1983

Before WOOD and POSNER, *Circuit Judges*, and GORDON, *Senior District Judge.**

POSNER, *Circuit Judge.* Rule 68 of the Federal Rules of Civil Procedure allows a defendant, up to 10 days before the trial begins, to "serve upon the adverse party an offer to allow judgment to be taken against him for the money or property or to the effect specified in his offer, with costs then accrued." If the offer is rejected and "the judgment finally obtained by the offeree is not

* Hon. Myron L. Gordon of the Eastern District of Wisconsin, sitting by designation.

more favorable than the offer, the offeree must pay the costs incurred after the making of the offer." Little known and little used (see Note, *Rule 68: A "New" Tool for Litigation*, 1978 Duke L.J. 889, 890), Rule 68 has attracted attention recently as part of a broader interest in limiting the number of federal trials at a time of rising costs of litigation and unprecedented federal caseloads.

This case, a civil rights suit under 42 U.S.C. § 1983, involves the interplay between Rule 68 and statutes that allow a prevailing plaintiff to get his attorney's fees reimbursed by the defendant, specifically the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988. The Act provides that in a civil rights case the district "court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee as part of the costs." Though no explicit distinction is made between plaintiffs and defendants, the Supreme Court has interpreted the statute as creating a presumption in favor of awarding fees to a prevailing plaintiff, *Hensley v. Eckerhart*, 103 S. Ct. 1933, 1937 (1983), but as not allowing a prevailing defendant to get his attorney's fees reimbursed unless the suit was frivolous, *Hughes v. Rowe*, 449 U.S. 5, 14-15 (1980) (per curiam). This distinction is supported by the legislative history. See H.R. Rep. No. 1558, 94th Cong., 2d Sess. 6-7 (1976); S. Rep. No. 1011, 94th Cong., 2d Sess. 3-5 (1976).

The defendants in this case made a timely Rule 68 offer "for a sum, including costs now accrued and attorney's fees, of ONE HUNDRED THOUSAND ($100,000) DOLLARS." We must decide whether an offer that includes attorney's fees is valid under the rule, and if so whether the rejection of a valid Rule 68 offer more favorable than the judgment the plaintiff finally obtains prevents the plaintiff from getting an award of attorney's fees for any work done after the offer was made. Both are questions of first impression at the appellate level.

The district judge skipped over the first question because he misread the offer to be (in his words) "for $100,000 plus costs and attorneys' fees then accrued." 547



F. Supp. 542, 545 (N.D. Ill. 1982). Since the jury's verdict (upon which judgment was entered) was for only $60,000, it was obvious to the judge that the plaintiff had received a judgment that was less favorable than a valid Rule 68 offer. The judge then answered the second question "yes," and so awarded the plaintiff just the $32,000 in attorney's fees and costs that the parties agreed the plaintiff had reasonably incurred up to the date of the Rule 68 offer. The judge refused, however, to award the defendants their attorney's fees, pointing out that section 1988 allows only the prevailing party's fees to be taxed as costs, and the defendants did not prevail; they did better than the plaintiff expected but it was the plaintiff who was the prevailing party, because the jury returned a verdict for the plaintiff and judgment was entered on the verdict. The plaintiff, hoping to get an award of fees for the time put in on the case after the Rule 68 settlement offer was made, has appealed.

The offer, even when it is read correctly, was more favorable to the plaintiff than the judgment he got. The parties agree that the offer was for $100,000 *including* costs and attorney's fees accrued as of the date of the offer, but the sum of the jury's verdict ($60,000) and the accrued costs and attorney's fees ($32,000) is still less than $100,000. We reject the argument that the relevant judgment amount is not just the amount of the jury verdict but that plus a reasonable attorney's fee for work done after the date of the settlement offer. Any such fee would, so far as appears, merely offset the costs to the plaintiff of the additional legal work required for the trial. A judgment for $80,000 is not more favorable than a judgment for $60,000 if the difference is merely compensation for the added legal expense of getting the bigger judgment.

Coming to the form of the offer, we note that Rule 68 does not say that the offer is to be just for an amount of damages; it is to be "for the money or property or to the effect specified," and it is hard to see why the "money . . . specified" or the "effect specified" cannot be an unliquidated sum such as attorney's fees accrued

as of the date of the offer. The rule does not, it is true, require the defendant to set a figure on costs; an offer of the money or property or to the specified effect is, by force of the rule itself, "with"—that is, plus "costs then accrued," whatever the amount of those costs is. But it does not follow that the defendant may not specify a figure inclusive of costs, if he wants, or of attorney's fees, which are not mentioned in the rule and which usually (almost always back in 1938, from when this part of the rule dates without substantive amendment) are not included in costs.

If the form of offer that the defendants used here was invalid, Rule 68 would be unusable in many and perhaps most cases where a statute authorizes an award of attorney's fees to a prevailing plaintiff. As Justice Rehnquist pointed out in his dissenting opinion in *Delta Air Lines, Inc. v. August*, 450 U.S. 346, 379 n. 5 (1981) (the case that decided that Rule 68 does not apply where the defendant rather than the plaintiff is the prevailing party), many a defendant would be unwilling to make a binding settlement offer on terms that left it exposed to liability for attorney's fees in whatever amount the court might fix on motion of the plaintiff. To get his clients to authorize him to make a $100,000 settlement offer in this case the defendants' counsel represents to us that he had to be able to tell them that if the offer was accepted their liability would be at an end—that they would not be exposed to an additional liability of unknown amount for the plaintiff's attorney's fees. The potential liability was great; the plaintiff asked the district court to award him $173,000 in fees. Although some cases are settled with the understanding that the district court may award attorney's fees on top of the settlement, many cannot be settled on that basis, because of the open-ended nature of such a settlement. Cf. *Cruz v. Pacific Am. Ins. Corp.*, 337 F.2d 746, 750 (9th Cir. 1964).

This point would not have occurred to the draftsmen of Rule 68. The award of attorney's fees to prevailing plaintiffs was uncommon in 1938, though not unknown—



the copyright, securities, and antitrust statutes all allowed such awards. See Payne, *Costs in Common Law Actions*, 21 Va. L. Rev. 397, 405 n. 23 (1935). But today a large number of federal statutes allow such awards. There is no up-to-date count but published compilations for the middle 1970s range from 75 to 90. Fortunately Rule 68 is not so inflexibly drafted that it cannot be interpreted in a way that will preserve its utility in an age of attorney-fee statutes. As we have seen, it is not inflexibly drafted at all. If the draftsmen did not foresee the application of the rule in cases where the plaintiff might be entitled to an award of attorney's fees if he won, neither did they preclude it.

True, the type of offer that the defendants made adds slightly to the burdens of our overworked district judges. It requires the judge not only to fix a reasonable attorney's fee but to determine how much of that fee accrued before the date of the judgment offer, if such an offer was made and was more favorable than the judgment the plaintiff received; this apportionment is necessary to determine whether the offer really was more favorable than the judgment. The burden on the district judge is masked in this case by the fact that the parties agreed on the amount of reasonable attorney's fees that had accrued; in some cases they will not agree. But since an attorney-fee award is based on number of billable hours, see, e.g., *Bonner v. Coughlin*, 657 F.2d 931, 934 (7th Cir. 1981) (per curiam), and the lawyer must keep detailed records of when those hours were incurred, *National Ass'n of Concerned Veterans v. Secretary of Defense*, 675 F.2d 1319, 1327 (D.C. Cir. 1982) (per curiam), at least where it is feasible for him to do so, cf. *Gautreaux v. Chicago Housing Authority*, 690 F.2d 601, 612 n. 28 (7th Cir. 1982), it should not be difficult to apportion the award between pre-offer and post-offer work. It should not be more difficult, indeed, than the identical apportionment—of costs—that Rule 68 explicitly requires the judge to make (assuming the offer is silent on costs).

We respectfully disagree with the suggestion in Justice Powell's concurring opinion in the *Delta* case, see 450 U.S. at 364, that a lawyer faced with a Rule 68 offer that is inclusive of legal fees might have a serious conflict of interest in advising his client whether to accept it. There is a potential conflict of interest whenever a plaintiff and his lawyer have an ordinary contingent-fee contract and a settlement offer is made. Suppose a defendant offers $100,000, the contingent fee is 30 percent regardless of when the litigation ends, and the lawyer is sure he can get a judgment for $120,000 if the case is tried but knows that it will cost him, in time and other expenses, $8,000 to try it. His client will be better off if the case is tried, for after paying the lawyer's fee he will put $84,000 in his pocket rather than $70,000 if it is settled. But the lawyer will be worse off, since his additional fee, $6,000 ($36,000 – $30,000) will be less than the trial costs of $8,000 that he must incur. He has a conflict of interest.

Yet problems such as these have not been thought (in this country at least) so serious as to require prohibiting or even closely regulating contingent-fee contracts. The market for legal services protects plaintiffs to some extent, as shown by the fact that contingent-fee contracts commonly entitle the lawyer to a higher percentage of the judgment if the case goes to trial; this is one way of dealing with the conflict of interest in our example. The form of offer in this case does not create a more serious conflict of interest. Indeed, in many cases where a statute allows the award of attorney's fees, the plaintiff and his lawyer will agree in advance to give the lawyer a specified percentage of the sum of the damages awarded by the jury and the attorney's fee awarded later by the judge. That of course is equivalent to a standard contingent-fee contract in a case where there is no attorney's fee statute. The plaintiff and his lawyers had a contingent-fee arrangement in this case, though its terms are not in the record and could be quite different from the above. See, e.g., *Lenard v. Argento*, 699 F.2d 874, 897 n. 21 (7th Cir. 1983). But even if the arrangement



here is that the lawyers are to receive a fixed share of any damages awarded and, on top of that, whatever attorney's fee the court awards, it would not create a serious conflict of interest. The plaintiff's lawyers would simply tell the plaintiff what he would net if he instructed them to accept the offer; if the plaintiff thought the lawyers were taking too much, he could ask the court to arbitrate the dispute, see *Prandini v. National Tea Co.*, 557 F.2d 1015, 1020-21 (3d Cir. 1977). It would thus be like any other case where the plaintiff and his lawyer do not completely specify the fee beforehand: when a settlement offer is made, the lawyer, in advising the client whether to accept it, has to indicate how much the client will net after the lawyer's fee is subtracted. In the absence of disagreement, the court in this case would not have had to make an award of fees if the plaintiff had accepted the Rule 68 offer; acceptance of an offer that expressly covered attorney's fees would have been a waiver of the plaintiff's right to any court-ordered award.

We conclude that the form of offer in this case is valid. The next question is whether the plaintiff's rejection of the offer bars him from receiving an award of attorney's fees for work performed on the case after the offer was made. It is undisputed that if the offer was valid and more favorable than the judgment, the plaintiff cannot recover any of the usual taxable costs—filing fees and the like (see 28 U.S.C. § 1920)—that accrued after the offer was made; but these we are told are no more than $1,000. The dispute is over whether "costs" in Rule 68 includes attorney's fees where a statute allows attorney's fees to be taxed as costs recoverable by the prevailing party.

The district court's conclusion that it does rests on the following rather mechanical linking up of Rule 68 and section 1988. Since this is a civil rights case, since Rule 68 refers to costs, and since section 1988 allows attorney's fees to be taxed as costs in civil rights cases, Rule 68 costs must include any section 1988 attorney's fees that might be awarded to the prevailing plaintiff. If, therefore, the plaintiff rejects a valid Rule 68 offer and later gets

a less favorable judgment, he cannot make the defendant pay him any of his attorney's fees that accrued after the date of the offer.

This approach, though in a sense logical, puts Rule 68 into conflict with the policy behind section 1988. Section 1988 was intended to encourage the bringing of meritorious civil rights actions, such as the present action, which resulted in a judgment for the plaintiff of $60,000 for the death of his decedent at the hands of the three police officers who are the defendants. See *Hensley v. Eckerhart*, *supra*, 103 S. Ct. at 1937; H.R. Rep. No. 1558, *supra*, at 1, 3, 9; S. Rep. No. 1011, *supra*, at 2, 6. The effectiveness of section 1988 would be reduced if the rejection of a Rule 68 offer that turned out to be more favorable than the judgment the plaintiff eventually received prevented the plaintiff from getting any award of legal fees that accrued after the date of the offer. That would mean in this case that the plaintiff's lawyers would have either to collect an additional fee from the plaintiff, thus reducing his net recovery from the jury's $60,000 damage award, or to swallow the time they put in on the trial. Either way, the next time they are faced with a similar offer they will have to think very hard before rejecting it even if they consider it inadequate, knowing that rejection could cost themselves or their client a lot if it turned out to be a mistake.

Placing civil rights plaintiffs and counsel in this predicament cuts against the grain of section 1988. " '[P]rivate attorneys general' should not be deterred from bringing good faith actions to vindicate the fundamental rights here involved by the prospect of having to pay their opponent's counsel fees should they lose." S. Rep. No. 1011, *supra*, at 5. By the same token they should not be deterred from bringing good faith actions to vindicate fundamental rights by the prospect of sacrificing all claims to attorney's fees for legal work at the trial if they win, merely because on the eve of trial they turned down what turned out to be a more favorable settlement offer. See Note, *supra*, 1978 Duke L.J. at 901. Moreover, since 10 days before trial is merely the deadline for the offer, if it were made



right after the complaint was filed it might deter the plaintiff's lawyers from conducting any pretrial discovery.

The Rules Enabling Act, now 28 U.S.C. § 2072, provides that the Federal Rules of Civil Procedure "shall not abridge, enlarge or modify any substantive right . . . ." Although no rule has ever been invalidated under this provision, Wright, The Law of Federal Courts 406 (4th ed. 1983), rules have sometimes been interpreted or their domain of application narrowed to avoid abridging substantive rights. This is what happened to Rule 3 in *Ragan v. Merchants Transfer & Warehouse Co.*, 337 U.S. 530, 533 (1949); see Wright, *supra*, at 385-86, 412, and to Rule 68 itself in *Gay v. Waiters' & Dairy Lunchmen's Union, Local No. 30*, 86 F.R.D. 500 (N.D. Cal. 1980). Although the right to attorney's fees created by section 1988 is in one sense not "substantive" but "procedural," because it governs the relations between the parties to a lawsuit, in another sense it is more "substantive" than "procedural." It does not make the litigation process more accurate and efficient for both parties; even more clearly than the statute of limitations involved in *Ragan*, it is designed instead to achieve a substantive objective—compliance with the civil rights laws. This makes it more like a right to receive punitive damages (universally regarded as a substantive right) than like a right to take depositions. But no doubt the right is better described as both substantive and procedural, or as substantive for some purposes and procedural for others. Cf. *Guaranty Trust Co. v. York*, 326 U.S. 99, 108 (1945). For present purposes it is substantive. When Congress authorized the Supreme Court to make rules of procedure for civil cases it did not authorize the Court to alter substantive policies (that is the force of the "shall not abridge" clause), such as those that underlie the right to attorney's fees created by section 1988, call that right what you will. But that is what the Court would (unwittingly) have been doing when it promulgated Rule 68 if the district court's interpretation of the rule were upheld. And the Rules Enabling Act to one side, section 1988 of its own force prevents

us from reading "costs" in Rule 68 to include attorney's fees. The legislators who enacted section 1988 would not have wanted its effectiveness blunted because of a little known rule of court promulgated almost 40 years earlier.

We are aware that the Advisory Committee on the Federal Rules of Civil Procedure proposed recently that Rule 68 be revised to require the offeree to pay the offeror's reasonable attorney's fees in all cases where the offer turns out to be more favorable than the judgment. See *Preliminary Draft of Proposed Amendments*, 98 F.R.D. 337, 353, 361-64 (1983). But the Committee did not discuss and may not have considered the possible impact of the proposed amendment on attorney's fees statutes such as 42 U.S.C. § 1988 that are intended to encourage particular kinds of litigation. In any event, the proposed amendment has not yet been approved, and the fact that it has even been proposed shows that the draftsmen could not have been confident that the district court ruled correctly in this case.

The Advisory Committee thought that unless the offeree is penalized by being made to pay the offeror's attorney's fees, Rule 68 will never become an effective tool for inducing settlements. See 98 F.R.D. at 353, 363, 365; cf. Note, *supra*, 1978 Duke L.J. at 890. The fact that Rule 68 seems to be so little used provides some support for the Committee's view, but against this it can be noted that, even narrowly construed, the rule's provision on costs creates an incentive for the defendant to make a reasonable offer and that once such an offer is on the table the plaintiff has a big incentive to accept it and thereby avoid the expenses and uncertainty of a trial. Cf. Dobie, *The Federal Rules of Civil Procedure*, 25 Va. L. Rev. 261, 304 n. 195 (1939).

*Fulps v. City of Springfield*, 715 F.2d 1088, 1091-95 (6th Cir. 1983), states, in apparent contradiction to our view, that the word "costs" in Rule 68 includes attorney's fees when there is an applicable statute such as section 1988 that allows attorney's fees to be taxed as costs to the winning party. But the issue in *Fulps* was different from



the issue here. It was whether a settlement offer for $5,000 that unlike the offer in this case was silent on attorney's fees should be interpreted to include them, and we have no quarrel with the court's conclusion that it should not be. The court was not dealing with the question whether Rule 68 can be used to abrogate the right to attorney's fees that a plaintiff would otherwise have by virtue of section 1988. Incidentally, in *Pigeaud v. McLaren*, 699 F.2d 401, 403 (7th Cir. 1983), we recently read "costs" in Rule 68, contrary to *Fulps*, as excluding attorney's fees (as we do today, while recognizing that the issue in *Pigeaud*, as in *Fulps*, was different from the issue in this case). More nearly in point is *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 761-62 (1980), where the Supreme Court held that "costs" in 28 U.S.C. § 1927 (which, as it then read, empowered the district court to assess additional costs against an attorney who "so multiplies the proceedings in any case as to increase costs unreasonably and vexatiously") did not include attorney's fees in a civil rights case, even though section 1988 allows attorney's fees to be taxed as costs in such a case. No more should "costs" in Rule 68 be read to include attorney's fees in such a case.

We thus affirm the fee award insofar as it gave the plaintiff $32,000 for his fees and costs incurred up to the date of the award, but we reverse insofar as the district court denied the plaintiff any award of fees for services beyond that date and we remand the case to the district court to determine a reasonable attorney's fee for those services. Circuit Rule 18 shall not apply.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

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**APPENDIX B**

IN THE UNITED STATES DISTRICT COURT
For The Northern District Of Illinois
Eastern Division

ALFRED W. CHESNY, etc.,
*Plaintiff,*
*v.*
J. MAREK, et al.,
*Defendants.*
No. 79 C 4186

## MEMORANDUM OPINION AND ORDER

Alfred W. Chesny ("Chesny"), individually and as administrator of the estate of his deceased son Steven, sued defendants under 42 U.S.C. § 1983 ("Section 1983") and a number of state tort laws based on the allegedly unlawful fatal shooting of Steven. After trial on the merits a jury found in part for Chesny and awarded a total of $60,000 against defendants Marek, Wadycki and Rhode. Chesny now moves for an additur to the judgment as well as an award of attorneys' fees. Defendants move for judgment n.o.v. as well as an award of attorneys' fees. For the reasons stated in this memorandum opinion and order Chesny's motions are granted in part and denied in part and defendants' motions are denied.

### Additur

#### Loss of Future Earnings

Though the jury failed to award Chesny any amount as compensation for the loss of Steven's future earnings, Chesny

claims he is entitled to such recovery as a matter of law.[1] Chesny's expert economist testified that based on Steven's wage rate at the time of his death ($5.50 an hour), less a 30% deduction for personal consumption, the present value of his future lost earnings amounted to $504,859.

But a plaintiff is not absolutely entitled to recover such future earnings in a death action. Recovery is limited to the damage suffered by the next of kin. That damage can take two forms:

> 1. what amount decedent would have spent on next of kin during his lifetime, and

[1] In part Chesny seeks to fault this Court for claimed error in the jury instructions on damages. That represents impermissible second guessing or sour grapes or both. Chesny's Instruction 46 was given as tendered. It directed the jury to "consider" three elements of damages (one of which was loss of future earnings) and said:

> Whether each of these elements of damages has been proven by the preponderance of the evidence is for you to determine.

Chesny cannot complain if the jury took that instruction at face value and decided loss of future earnings had *not* been proved. Moreover, it was actually during the course of trial that our Court of Appeals decided *O'Shea v. Riverway Towing Co.*, 677 F.2d 1194 (7th Cir. 1982). Cross-examination of Chesny's expert economist by defense counsel, just a few days before this Court received the slip sheet opinion in *O'Shea*, had created the potential risk of an improperly high discounting of future earnings if the jury decided to award them. This Court therefore drew counsel's attention to the newly-decided case and drafted Court's Instruction 1 to deal with the proper calculation of such damages. Chesny's counsel specifically approved that instruction (drawn to avoid potential prejudice to his client) during the jury instruction conference (Tr. 155, May 10, 1982). It ill becomes counsel to assert error on that score. In legal terms, doctrines of either waiver or induced error (if it were error) dispose of that untenable argument.



> 2. what amount would have accumulated in decedent's estate by the time of his death.

*Keel v. Compton*, 120 Ill.App.2d 248, 256 N.E.2d 848 (3d Dist. 1970); *Denton v. Midwest Dairy Products Corp.*, 284 Ill.App.279, 1 N.E.2d 807 (4th Dist. 1936).

As to the first of those elements, there was ample evidence from which a jury could conclude Steven was not supporting anyone and his entire future earnings would have gone either into savings or personal consumption. Thus a jury could reasonably have limited its award to the amount (if any) Steven would have left in an estate at the time of his death (assuming a normal life expectancy).

As for the second factor, this Court also finds the jury could reasonably conclude Steven would not have left any money in his estate. It is true the testimony of Chesny's expert was that Steven would personally consume only 30% of his total future earnings and the remaining 70% would be left as an estate. Defendants offered no expert testimony on that score. But a plaintiff carries the burden of proof as to all damages, and the jury was entitled to reject the expert's testimony and draw its own conclusions.[2] This Court cannot overturn the jury's implicit determination that Steven would have left no estate at his death.

[2] Certainly a jury could rationally reject the 30% personal consumption figure as improbably low for a single man earning at an $11,000 annual rate, living in his own apartment (of substantial size in an attractive building in a suburban residential neighborhood, all as viewed by the jury) and buying and owning an automobile. Indeed the evidence of Steven's having a savings account was coupled with testimony as to his having used his savings for the automobile and other personal acquisitions. In addition the jury could have considered Steven's spotty employment record since high school graduation, in-

*(Footnote continued on next page)*

**Funeral Expenses**

Chesny also claims the uncontradicted testimony demonstrated he was entitled to recover $3,000 in funeral expenses. Defendants correctly contend that the verdict forms approved by Chesny's counsel, providing separate lines for separate categories of damages, asked only for the jury's listing of (1) compensatory damages for the constitutional injury and (2) lost earnings. They say Chesny failed to ask for pecuniary damages and therefore lost his chance to get recover for funeral expenses. [Sic.]

Under the circumstances Chesny cannot prevail:

1. If funeral expenses *could not* be within the "compensatory damages" awarded by the jury, Chesny effectively waived his right to their recovery by failing to provide a separate instruction for such an award.

2. If funeral expenses *could* be part of the "compensatory damages" award, the jury must be viewed as having included it within the damage award.

Once again (as with the issue described at n.1) Chesny wrongly seeks to exercise hindsight.

**Defendants' Motion for Judgment N.O.V.**

Defendants' motion for judgment n.o.v. is based on this Court's failure to instruct the jury on the requirements of the

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*(Footnote continued from preceding page)*

volving sporadic work as a service station attendant and only a few months' work as a surveyor (at the $5.50 hourly rate) before his untimely death. And of course an expectation of increased earnings in future years can rationally be matched by a jury with an expectation of correspondingly increased consumption. This is not of course to indicate what this Court's resolution of the evidence would have been had it, not the jury, been the trier of fact—but such substitution of judgment is not the Court's role on the current motion.



Illinois Criminal Code for police conduct. That failure does not constitute error because (1) federal law not state law establishes the proper standard of conduct and (2) in any case defendants have failed to point to *any* substantive difference between the standard of conduct outlined in the Illinois Criminal Code and the actual instruction given by this Court. Again the jury's resolution of the factual issues was rational. Accordingly defendants' motion for judgment n.o.v. and their related motion for fees and costs must be denied.

**Fed. R. Civ. P. ("Rule") 68**

Rule 68 provides:

> At any time more than ten days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against him for the money or property or to the effect specified in his offer, with costs then accrued. . . . An offer not accepted shall be deemed withdrawn and the evidence thereof is not admissible except in a proceeding to determine costs. If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer.

Defendants made a proper Rule 68 offer of judgment to Chesny for $100,000 plus costs and attorneys' fees then accrued. Because the eventual jury award was only $60,000, Rule 68 comes into play. It poses several problems in the context of this case.

If Rule 68 is applicable, there is no doubt Chesny cannot collect from defendants any "costs" incurred after the date of the offer of judgment. That in turn poses the question whether "costs" as used in Rule 68 include attorneys' fees, preventing Chesny from recovering fees incurred after the date of the offer.

Chesny first contends Rule 68 should not apply because the $100,000 offer was not reasonable in light of the nature of

this action. Rule 68 does not literally require a "reasonable" offer, but Chesny cites *August v. Delta Air Lines, Inc.*, 600 F.2d 699 (7th Cir. 1979) to support a reasonableness requirement.

In *August* the plaintiff eventually lost at trial after a nominal Rule 68 offer of judgment. Our Court of Appeals held Rule 68 would not apply because the offer was not a good faith attempt to settle the action. But the Supreme Court affirmed on entirely different grounds, *Delta Air Lines, Inc. v. August*, 450 U.S. 346 (1981). It held Rule 68 did not apply at all to a situation where a plaintiff lost a trial after a valid Rule 68 offer of judgment. Instead Rule 68 operates only where a plaintiff eventually prevails at trial but for an amount less than the offer of judgment. Chesny in essence argues the Seventh Circuit *August* rule should still apply in that event.

That reading is dubious at best in light of the Supreme Court's treatment of the issue. If a plaintiff wins at trial, but is awarded a judgment for less than the earlier Rule 68 offer, it is really a contradiction in terms to label that offer a sham. As the Supreme Court said, 450 U.S. at 355:

> But the plain language of the Rule makes it unnecessary to read a reasonableness requirement into the Rule. A literal interpretation totally avoids the problem of sham offers, because such an offer will serve no purpose, and a defendant will be encouraged to make only realistic settlement offers.

Moreover, even if a reasonableness requirement were incorporated into Rule 68 this Court would find defendants' offer of $100,000 met that test. In *August* the sham or unreasonable offer with which our Court of Appeals was concerned was a truly nominal offer whose only purpose was to put the plaintiff at peril under Rule 68. While Chesny might have been of the opinion the $100,000 offer was low, and while defendants may well have been prepared to go higher in negotiations, the offer was certainly a good faith attempt to settle the action and not simply a sham designed to invoke Rule 68. That Rule must be held to apply here.



As already indicated, the real question then becomes whether attorneys' fees are part of the post-offer "costs" Chesny cannot recover. Authority on that question is sparse. Two early cases may arguably be said to support the proposition that costs under Rule 68 should not include attorneys' fees. *Gamlin Chemical Co. v. Dacar Chemical Products Co.*, 5 F.R.D. 216 (W.D. Pa. 1946); *Cruz v. Pacific American Insurance Corp.*, 337 F.2d 746 (9th Cir. 1964).[3] But more recent cases stand for a different result when an underlying statute specifically provides for an award of fees as part of costs to a prevailing plaintiff.

In *Waters v. Heublein, Inc.*, 485 F.Supp. 110 (N.D. Cal. 1979) a plaintiff prevailed at trial after a Rule 68 offer of judgment, but like Chesny obtained a judgment for less than the offer. *Waters* involved the Equal Pay Act, which like Section 1983 permits an award of attorneys' fees to prevailing plaintiffs. "Costs" in Rule 68 were held to include fees for several reasons:

1. Under the statutory scheme the award of fees was treated as a component of plaintiff's entitlement to costs.

2. Case law under Title VII required an award of fees to prevailing plaintiffs unless there was a showing of special circumstances.

3. Defendant's offer of judgment had included an offer of costs and attorneys' fees then accrued.

4. Including fees within Rule 68's definition of "costs" would promote the policy of encouraging settlements.

*See also Scheriff v. Beck*, 452 F.Supp. 1254, 1260 (D.Colo. 1978).

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[3] *Cruz* however is doubtful authority at best. Indeed a California district court (bound by Ninth Circuit authority, as this Court is not) found *Cruz* not controlling and included attorneys' fees within Rule 68 costs. *Waters v. Heublein, Inc.*, 485 F.Supp. 110, 115 n.3 (N.D. Cal. 1979).

Two other cases lend support to the *Waters* position. In *Greenwood v. Stevenson,* 88 F.R.D. 225 (D. R.I. 1980) a Section 1983 plaintiff accepted a Rule 68 settlement offer, which defendants then contended did not include attorneys' fees. Prevailing Section 1983 plaintiffs are entitled to fees as part of costs under 42 U.S.C. § 1988. After analysis the *Greenwood* court said that were the matter a question of first impression the court would agree with *Waters* and include fees as part of costs in Rule 68. However the court felt bound to rule otherwise because of a First Circuit opinion (the district court sat in that Circuit) that held a motion for allowance of fees came under Rule 59(e) and was not part of a motion for costs under Rule 54. That underpinning for the anti-*Waters* conclusion has since collapsed, for the First Circuit opinion was reversed by the Supreme Court in *White v. New Hampshire Department of Employment Security,* 102 S.Ct. 1162 (1982). There the Supreme Court held a motion for fees was *not* properly made under Rule 59(e).

Finally this Court's own opinion in *Coleman v. McLaren,* 92 F.R.D. 754 (N.D. Ill. 1981) considered whether an accepted Rule 68 settlement had included fees as part of the costs offer. Although this Court held it had not, the opinion specifically pointed out the underlying statute in that case did not provide for an award of fees to a prevailing plaintiff.

There is much force in the *Waters* approach. Shortly after the Supreme Court decision in *White* our own Court of Appeals held attorneys' fees should be sought along with costs under Rule 54(d). *Spray-Rite Service Corp. v. Monsanto Co.,* No. 80-1621, slip op. at 34-35 (7th Cir. June 28, 1982). Because Section 1988 specifies attorneys' fees are awarded as part of "costs," it makes eminently good sense to give the same word the same content for Rule 68 purposes in a Section 1983 case.

It is true that one important policy consideration was not addressed by the *Waters* court. Section 1983 suits are civil



rights actions, which carry with them a strong policy of encouraging vigorous enforcement. Most Section 1983 plaintiffs cannot independently afford to pay counsel, who thus receive compensation—only if they prevail—under Section 1988. That creates a potential conflict of interest for a plaintiff's counsel faced with a Rule 68 offer of judgment. Already undertaking a risk of handling a case without compensation should he or she lose, counsel would now confront the added risk of conducting a trial without compensation should the eventual verdict be less than the offer of judgment. Because the offer of judgment must include fees accrued to that time, trying the case may present greater peril than potential benefit for the lawyer (as contrasted with the client). That creates a real possibility that a lawyer who genuinely believes (but is unsure) his or her client will receive more from a jury than from the Rule 68 offer of judgment might "sell out" the client to insure the lawyer's receipt of fees. Any such danger, always distressing, is doubly so in the context of enforcement of civil rights laws.

Despite that factor, after careful consideration this Court is persuaded to the *Waters* result. First, the *Waters* point of view is consistent with the literal language of Rule 68 and Section 1988 (as well as our Court of Appeals' ruling that fees should be sought under Rule 54 as part of "costs"). Second, such an interpretation will stimulate realistic settlement efforts before trials. Finally, the problem Chesny claims is presented by this case—and any consequent deterrence of civil rights actions—will rarely arise. It requires a combination of (1) a plaintiff's lawyer's reasonable assessment of the case as worth considerably more than defendant's offer and (2) an actual result less than that offer. This Court cannot be persuaded to adopt a wrong rule because the right one may have a harsh application in a few cases. Accordingly it holds that under Rule 68 Chesny cannot recover costs, including attorneys' fees, incurred after the offer of judgment.

Rule 68 poses one last problem suggested by the language (emphasis added):

> the offeree must pay *the costs* incurred after the making of the offer.

To this point this opinion has dealt with the offeree's (plaintiff's) payment of his *own* costs. But the rule also raises the question whether the *defendants'* "costs" are also payable by the plaintiff—and if so, whether such "costs" include defendants' attorneys' fees.

As for the latter question, a "no" answer is readily reached. Defendants, having lost the case (albeit by less than they originally offered in settlement) are not thereby rendered "prevailing parties" under Section 1988. Their "costs" therefore do not include attorneys' fees. *Waters*, 485 F.Supp. at 117.

In fact the same conclusion reasonably follows as to defendants' "costs" in the conventional sense. As the Supreme Court said in *August*, 450 U.S. at 359 n.24:

> Some commentators assume that the Rule, even when applicable, operates to deny costs to a prevailing plaintiff and not to impose liability for defendants' costs on that plaintiff.

It then quoted extensively from Wright & Miller, *Federal Practice and Procedure*, Moore's *Federal Practice* and a Virginia Law Reveiw article. This Court agrees with the position taken by the cited authorities.[4] It will not award defendants any costs against Chesny.

**Fee Request**

Chesny will obviously have to submit a revised fee request limited to fees incurred up to the time of the judgment offer.

[4] *Waters*, 485 F.Supp. at 117, did come to a different conclusion.



However this Court can make the following comments at this time:

1. It will not permit an award for costs incurred for clerical and secretarial services. Those costs are part of an attorney's overhead and are included in the attorney's hourly fee. Awards for paralegal time are not analogous, for those expenses are customarily separately billed to a client.

2. It finds, based on the professional experience of Chesny's attorneys, that the hourly rates sought are reasonable.[5]

3. It rejects defendants' arguments that a reasonable amount of fees should be determined by looking either to defendants' fees or to an amount equal to one-third of the eventual award. Reasonableness of the time spent, in light of the factors identified in the case law, is the issue.

4. Defendants are of course entitled to an evidentiary hearing if they so desire. But fees generated by such a hearing are also compensable (and would be charged to defendants notwithstanding Rule 68). *Spray-Rite*, slip op. at 39. Under the circumstances it appears to be in the parties' mutual self-interest to resolve accounting and verification matters without requiring a formal hearing.

This Court will not make any determination at this time as to the reasonableness of the hours spent by Chesny's counsel or as to the possible use of a multiplier.

[5] Defendants unfairly denigrate (although they disclaim that intention) the experience of Chesny's lead counsel as derived in "all criminal or quasi-criminal cases" (July 29, 1982 Mem. 13). In fact 1½ years of counsel's 25 years at the bar were spent in the massive *Hampton v. Hanrahan* litigation. In any case, this Court is well satisfied as to the quality of the representation afforded by lead counsel as well as his experience, and it finds the requested $150 hourly rate for his time is very reasonable indeed.

**Conclusion**

Defendants' motion for judgment n.o.v. and attorneys' fees is denied. Chesny's motion for an additur is denied. Chesny's motion for fees as a prevailing party under Section 1988 is granted except that Chesny shall be entitled to fees and costs incurred up only until the time of the offer of judgment. Chesny's counsel shall submit a revised fee request on or before September 13, 1982. On or before September 20, 1982 defendants' counsel shall notify the Court and opposing counsel whether an evidentiary hearing will be required.

/s/ MILTON I. SHADUR
Milton I. Shadur
*United States District Judge*



**APPENDIX C**

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

January 20, 1984

**Before**

Hon. WALTER J. CUMMINS, Chief Judge
Hon. WILBUR F. PELL, JR., Circuit Judge
Hon. WILLIAM J. BAUER, Circuit Judge
Hon. HARLINGTON WOOD, JR., Circuit Judge
Hon. RICHARD D. CUDAHY, Circuit Judge
Hon. JESSE E. ESCHBACH, Circuit Judge
Hon. RICHARD A. POSNER, Circuit Judge
Hon. JOHN L. COFFEY, Circuit Judge
Hon. JOEL M. FLAUM, Circuit Judge

ALFRED W. CHESNY, Individually, and as Administrator of the Estate of STEVEN CHESNY, Deceased,
*Plaintiff-Appellant,*

No. 82-2927 *vs.*

J. MAREK, et al.,
*Defendants-Appellees.*

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 79 C 4186

Milton Shadur, Judge.

**ORDER**

On November 17, 1983, defendants-appellees J. Marek, et al., filed a petition for rehearing with suggestion for rehearing *en banc*. All of the judges on the original panel have voted to deny the petition, and a majority of the active judges have voted to deny the suggestion for rehearing *en banc*.* The petition is therefore DENIED.

* Circuit Judges Pell, Bauer, and Coffey voted to grant a rehearing *en banc*.

# APPENDIX D

## RULES OF THE UNITED STATES DISTRICT COURT—NORTHERN DISTRICT OF ILLINOIS

### RULE 39. Affidavit Evidencing Ethical Conduct

(a) No attorney shall file any action or defense in this Court which has been illegally or unethically solicited by or for him or in connection with which he has personally or through another given or promised to give any valuable consideration, either to a party involved or to any other person. No attorney shall promise to pay or pay as consideration for his employment, the expenses of a party. Upon good cause shown, however, the Court may, after proper filing of a complaint, authorize the advancing or loaning of money to an indigent plaintiff by the attorney for court costs, medical and living expenses subject to reimbursement out of the proceeds of any settlement or judgment. No attorney shall split fees with a layman or prosecute or defend a claim in this Court which has been solicited for or by him for money, fee, commission or other remuneration. No attorney shall represent a party to any action in this Court on a contingent fee basis without compliance with the applicable provisions of subsections (d), (e) and (f) hereof. As used herein, "contingent fee basis" shall include any fee arrangement under which the compensation is to be determined in whole or in part on the result obtained. To show compliance herewith, every attorney except the attorneys for the U.S. or for any state or subdivision thereof, unless the attorney has an agreement with any state or subdivision thereof to handle such action on a contingent fee basis, shall file with the appearance, complaint, answer or other initial pleading a sworn statement on the affidavit form set forth in (c) below, together with a copy of the contingent fee agreement, if any, containing the information hereinafter provided. The Clerk of the Court shall furnish copies of the affidavit upon request.

(b) Upon the removal of any cause to this Court and simultaneously with the docketing thereof pursuant to 28 U.S.C. § 1441 et seq., the attorney effecting the removal shall file the affidavit evidencing compliance with this rule as aforesaid, together with any contingent fee agreement, and the attorney who filed the action in the Court from which it was removed shall file a similar affidavit and copy of any contingent fee agreement simultaneously with the filing of the first pleading, motion, or any other action that he takes in said cause in this Court. Failure to meet these requirements shall bar the said attorney from the proceedings until this provision is complied with. This paragraph shall not apply to attorneys for the U.S. or for any state or subdivision thereof unless the attorney has an agreement with any state or subdivision thereof to handle such action on a contingent fee basis.

(c) The affidavit to be furnished by the Clerk to counsel for completion as evidencing compliance with this rule shall be as follows:

Affiant is the attorney of record for

.....

(here insert all parties represented by affiant) and has knowledge of the matters covered by this affidavit and has read General Rule 39.

Affiant has not directly or indirectly solicited employment by the above-named party or parties, and knows of no solicitation of said party or parties by any person that has resulted in the employment of the affiant, except (here state all exceptions, or if none state "no exception").

Affiant has not paid, or promised to pay, and knows of no payment or promise of payment to the above-named party, or parties, of the costs of this case, or of the medical, living or other expenses of any party, or of any part of an attorney's fee,



or of any portion of the recovery by suit or settlement herein to any person whatever other than the above-named party or parties and the attorneys of record herein, except (here state all exceptions or if none state "no exception"):

Affiant has filed contemporaneously herewith a signed copy of any written contingent fee agreement applicable to his compensation for representing the above-named party or parties in this action and represents that a signed copy thereof has been furnished to each party whom he represents; if no copy of a contingent fee agreement is filed herewith, affiant represents that his compensation for services in this case is not on a contingent basis.

.....

(Affiant)

Subscribed and sworn to before me this ..... day of ....., A.D. 19.....

.....

TITLE

(d) Any contingent fee agreement with respect to the representation of any party or parties to an action in this Court shall be in writing in such number as to provide one copy for each client, one for the attorney and one for the Court. The original and each copy shall be signed by the attorney and by each client. One signed copy shall be delivered or mailed to each client at the time of making the agreement. One such copy shall be retained by the attorney and one filed with the Clerk of this Court contemporaneously with the filing of the affidavit required by this rule. Any such contingent fee agreement shall set forth the precise method by which the fee is to be determined, including the percentage, or percentages, if any, to be applied in the event of settlement, trial or appeal, whether expenses are to be deducted before or after the contingent fee is calculated and any other factors relevant to the fee arrangement.

(e) If an attorney of record in an action in this Court enters into a contingent fee agreement with respect to the representation of any party or parties to such action after the date hereinbefore provided for so doing, he shall comply with the provisions of subsection (d) hereof and file a copy of such agreement with the Clerk of this Court within three days after entering into such agreement.

(f) Upon final disposition of the action by settlement, trial or otherwise, each attorney who has entered into a contingent fee agreement in connection with his services in any action in this Court shall prepare a closing statement setting forth in detail (1) the computation of the fee, (2) any expenses, (3) all sums received in the matter by the attorney from any source, (4) the distribution made thereof, and (5) any other information necessary to present a definitive statement of the application of the contingent fee agreement in the action. One copy of such closing statement signed by the attorney shall be delivered or mailed to each party represented by him and one such copy filed with the Clerk of this Court within ten days after receipt by such attorney of any sum or sums to which such contingent fee agreement is applicable. (Adopted February 9, 1971)